United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original (Court)

74-1294

To be argued by
DAVID R. SPIEGEL

B P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
CARL M. ROBINSON,

Petitioner-Appellant,

against

LEON J. VINCENT, Superintendent, Green Haven Correctional Facility,

Respondent-Appellee.

BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE

Questions Presented

1. Whether the evidentiary record supports the finding of the District Court that there was an independent basis for Voltaggio's in-court identification and that it was therefore admissible at petitioner's trial?

2. Whether the accumulated circumstantial evidence tends to establish that there was no misidentification?

3. Whether the various, so-called errors committed by the trial court, petitioner's trial counsel, and the District Attorney are (a) properly raised in this appeal; (b) in any event, are significant enough to warrant habeas corpus relief?

Statement

Petitioner-appellant, Carl M. Robinson, is presently incarcerated at Green Haven Correctional Facility, Stormville, New York, pursuant to a judgment of the Supreme Court, New York County (FRANK, J.), rendered on March 20, 1971, convicting him, after a jury trial, of the crimes of robbery in the first degree, grand larceny in the second degree, possession of a weapon, and assault in the third degree, and sentencing him to consecutive terms of imprisonment for a total of not less than 8 years, 4 months nor more than 25 years.

In this habeas corpus proceeding, Robinson appeals from a decision of the United States District Court for the Southern District of New York (COOPER, J.), which, following an extensive evidentiary hearing, denied his claim that various pre-trial identification procedures utilized by the police after his arrest tainted the at-trial identification of an eyewitness to his crime.

The decision was rendered pursuant to a remand by this court (*U.S. ex rel. Robinson* v. *Zelker,* 468 F. 2d 159 [2d Cir. 1972], *cert. den.,* 411 U.S. 939 [1973], hereinafter 468 F. 2d at), which directed the District Court to explore the question of whether there was clear and convincing evidence of an independent source basis for the identification (468 F. 2d at 164-165).

Facts

The pertinent factual background herein is set forth in the records of petitioner's federal court evidentiary hearing (hereinafter cited as HTR, followed by the appropriate page number); in addition, we will refer to the minutes of Robinson's state court trial (hereinafter, STM). Like petitioner, we will allude to the information in these records in sequential fashion, beginning with the events of the crime.

A. The Crime

The events of the crime and petitioner's subsequent apprehension by the police are substantially uncontroverted.

At approximately 11:30 A.M. on the morning of May 3, 1968, Daniel Greenberg, the operator of a parking lot at 309 W. 46th Street (between Eighth and Ninth Avenues) was returning to the lot carrying change he had just obtained from a bank in a blue airline bag. While walking on the south side of 46th Street, approximately 50 feet after turning the corner from the west side of Eighth Avenue, he was shot in the back and his bag was grabbed from him by a young, Negro assailant in his twenties, who was later identified as Robinson (STM: Greenberg, 100-102; Voltaggio, 116).*

The crime was witnessed by two passerbys, Joseph Barcello and Juergen Schumann, and by Patrolman Ferdinand Voltaggio, assigned to the Parking Enforcement Squad, who was driving a police tow truck and was stopped for a traffic light at the southwest corner of Eighth Avenue (STM: Barcello, 16-21; Schumann, 44, ff; Voltaggio, 116-119, 154-156; HTR: Voltaggio, 6-8, 559-573). Their separate accounts indicate that the following sequence of events happened.

Robinson (he was identified by Voltaggio—STM, 116) ran across 46th Street to the north corner, at which point he was some 25 feet from Voltaggio (HTR: 560). He then ran across Eighth Avenue and jumped into the front right side of a white Mercury Cougar which was double parked on the northeast corner of Eighth Avenue with two other men in it (STM: Barcello, 20-21; Schumann, 47; HTR: Voltaggio, 8, 559-573).

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* We have appended to this brief a diagram illustrating the events of the crime. The diagram is merely a copy of Respondent's Exh. "A" at the federal hearing, with the addition of north-south, east-west directions and an explanation of the letter key.

Voltaggio gave chase in his tow truck and several blocks later, at 48th Street and Sixth Avenue—when Voltaggio was approximately 35 feet from the white Mercury—both cars became stuck in traffic (HTR: 17). At this point Voltaggio observed Robinson jump from the car and flee (HTR: 570-572). However, he was able to apprehend the other two occupants of the car, Walter and Charles Pyles. In the car he found a blue airline bag with the change Greenberg had obtained from the bank, a box of .22 caliber shells, and a Hertz car rental agreement for the car, made out to Carl M. Robinson, and listing his address as 40 Martin Place, Port Chester, New York (HTR: 23-25).

B. The Arrest of Robinson

Following the stopping of the getaway car Voltaggio brought the Pyles brothers to the 18th Precinct where they were booked by Detective Matthew Horan. Voltaggio furnished Horan with a copy of the Hertz agreement and provided him with the following description of Robinson: "unknown male, negro, 25 years old, 5'7", 150 lbs., brown complexion, dark shirt and jacket, dark pants" (HTR: Voltaggio, 75-76; Horan, 189-190). The description was then transmitted on police teletype as an alarm for petitioner's arrest (See HTR, Petitioner's Exh. 2).*

That evening, following testimony by Detective Horan as to the car rental agreement and virtually identical descriptions of Robinson by his girl friend, Odessa Chambers, and by Voltaggio, Judge Bloom of the Manhattan Criminal Court issued a warrant for Robinson's arrest.

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* The description is the first of several made by Voltaggio. Another was made at the arrest warrant hearing on the evening of the crime [HTR: Petitioner's Exh. "8" (Warrant Hearing Minutes, hereafter cited as WHM), at p. 12]; another at Robinson's trial some 21 months later (STM 149); and still another at the federal evidentiary hearing (HTR: 19). Despite petitioner's elaborate assertions to the contrary (Brief, pp. 32-35), it is clear that these descriptions are all virtually identical: petitioner is described throughout as approximately 5'7", 135-150 pounds, 23-25 years old, wearing a dark shirt and jacket.

Later that night Detective Horan went up to Port Chester and, after failing to find Robinson at his home, arrested him at the house of Odessa Chambers (HTR: 226-228).

C. The Allegedly Tainted Identification Procedures

(1) The Stationhouse Identification

On the evening of May 4, 1968, Robinson was brought down to the 18th Precinct and, without the presence of counsel, was identified by Voltaggio as the perpetrator of the crime.

There are two conflicting versions of the procedure used by the police.

Voltaggio and Horan asserted that there was one identification, that it took place in the squad room of the stationhouse with a direct confrontation between Voltaggio and Robinson, and that Voltaggio, having indicated to Horan that Robinson was the perpetrator, left "within a matter of seconds" (HTR: Horan 230, 345-346; Voltaggio, 33, 108).

Petitioner contended that *in addition* to the confrontation in the squad room, he was also, at two previous times, placed in a room with a one-way mirror and on at least one occasion heard voices outside (HTR: 412-415, 420-422, 501-502).*

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* Petitioner asserts in his brief at p. 10 that there is a third version of the events in the stationhouse, which is set forth in comments made by Voltaggio to Assistant Attorney General Stanley L. Kantor during a transcribed meeeting in Kantor's office on October 18, 1972. At that time Voltaggio asserted he had identified Robinson from a lineup (HTR: 113-116). However, at the hearing Voltaggio indicated that he was mistaken; that what had taken place was the one-man showup described *supra* and not a lineup (HTR: 116-117). This dovetailed with Voltaggio's prior testimony at Robinson's trial (STM: 172-173).

However, the District Court accepted the police version, reasoning that:

> "Whereas neither Voltaggio nor Horan had any motive to falsify regarding use of a mirror, petitioner must have been aware that if he could establish its use at the show-up his case would be greatly strengthened." (*U.S. ex rel. Robinson* v. *Zelker,* 371 F. Supp. 409 [S.D.N.Y. 1974] at 414, hereinafter cited as 371 F. Supp.)

In addition, the court found "a certain shrewdness and cunning substituted for candor" with respect to petitioner's testimonial expression (371 F. Supp. at 414).

(2) The Arraignment

Petitioner was arraigned on May 5, 1968 and pleaded not guilty. Robinson and Horan testified at the hearing that Voltaggio was present at the arraignment (HTR: Horan, 355; Robinson, 438-441). Voltaggio, despite contradictory testimony at his state court trial (STM: 192-193; 324), indicated that he was not. The District Court found that Voltaggio was "honestly mistaken" (371 F. Supp. at 415).

(3) The Photographic Display

Voltaggio testified at the hearing that at some time after the stationhouse showup, he was shown two pictures of Robinson (HTR: 39). The District Court found that this apparently took place at the arraignment (371 F. Supp. at 415).

D. The State Court Trial

Petitioner's trial was held on February 9-18, 1970. The events of the trial can be summarized as follows:

1. The People's Case

Apart from the victim (Daniel Greenberg), who stated that he was shot in the back without warning and was only

able to see that his assailant was young and black (STM: 97, 100-102), the People's case consisted largely of the testimony of three eyewitnesses to the crime—Joseph Barcello, Juergen Schumann, and Patrolman Ferdinand Voltaggio. Although two of these witnesses, Barcello and Schumann, did not actually identify Robinson at the trial, Schumann, who was closest to the scene, was able to render a description of Robinson which was substantially similar to the one given by Voltaggio for the pre-arrest alarm (STM: 58). The third witness, Voltaggio, identified Robinson as the perpetrator (STM: 116) and then described the crime as indicated, *supra,* pp. 2-3).

Also testifying for the People were Matthew Horan, the detective who arrested petitioner, and Francis Brooks, the salesman at Hertz Rent A Car who rented the white Mercury to Robinson. Brooks identified Robinson as the man who rented the car on the night of May 2, 1968 (STM: 262).

2. The Defense

Carl M. Robinson, testifying on behalf of himself, asserted that on the morning of the crime, he was at home in Port Chester with his girl friend (and later wife) Odessa Chambers (STM: 376-377). At about 11:00 A.M. —approximately half hour *before* the robbery--he left his home alone and spent the rest of the day fishing at a pier about a mile from Rye Beach Playland (STM: 381). However, petitioner produced no witnesses who could substantiate this detail of his story. This included Odessa Chambers.

As for the Hertz car rental agreement, petitioner conceded that he had indeed rented the white Cougar (STM: 329). However, the rental was not for himself but rather, for a long-time friend, one J. B. Ray, whom he thought would be unable to rent the car because he was not a Port Chester resident (STM: 346-347). Accompanying Ray were two other men, Walter and Charles Pyles (the per-

sons arrested in the car), neither of whom he knew very well (STM: 347). The three men left him off in Port Chester the night of May 2, 1968, and he never saw the car again (STM: 368). He had not seen Ray since the night of the crime (STM: 351-352).

Two other witnesses, William Alvin Holmes (a friend) and John Owen Plummer Robinson (Robinson's brother), testified briefly in an attempt to discredit the portion of the People's case dealing with the description of Robinson's mustache (The testimony sought to be discredited is at STM: 149 and 266-267.) Both men testified that Robinson's mustache was never thicker than it was in court—at which time it was a thin, pencil stripe mustache (STM: Holmes, 401-402; John Robinson, 404).

3. Charles and Walter Pyles: The Witnesses Who Never Testified

On three separate occasions, Walter and Charles Pyles —the occupants of the white Mercury who were arrested by Voltaggio—appeared in chambers before the court and asserted that they were prepared to testify.

The first occasion was the morning of February 16, 1974 —a week after the trial had started. Because the brothers could be indicted for "impairing prosecution" on the basis of what they said (STM: 304-305), the court warned them that they should consult a lawyer about their constitutional right not to testify (STM: 292-294, 303). When both witnesses indicated that they did wish to testify, the case was adjourned (STM: 302).

The next morning both witnesses again appeared in chambers, still concerned about the possibility of a further indictment (STM: 304-305; they had already been unsuccessfully indicted for the robbery itself). The Pyles conceded that they had discussed the case with their lawyer —a Mr. Dienst—and he had told them they could testify (STM: 320). The court told the brothers that on the day

before he was only telling them "what the law was", not that they "might (or might not) be indicted" (STM: 321). The proceedings were resumed on the assumption that the Pyles would testify.

On the morning of February 18, the Pyles again appeared in chambers. The court explained to them that in the interim, the District Attorney had agreed that their testimony would not be used against them affirmatively (STM: 417, referring to District Attorney's comments at 364, 366). Both men said they would testify and were told to be back at 2 P.M. (STM: 418-419, 422).

In the afternoon, however, the Pyles brothers did not show up. During the wait the court heard from their attorney who asserted that he told them they had two obligations "one moral . . . and one legal" and that they should not testify if their testimony would "implicate them" (STM: 433). At 2:55 P.M., with the Pyleses still missing, the trial was resumed (STM: 438).

4. The Summation and Charge

In its summation, the defense attempted to bolster the credibility of Robinson's alibi by asserting that the People's identification testimony was "incredible" (STM: 440-454; in particular, 444). Countering, the People asserted that, in fact, the witness testimony more than conclusively proved that Robinson was the man who did the shooting (STM: 455-479). The People briefly alluded to the stationhouse showup (STM: 465-466), but this was because the matter had already been treated at some length in the cross-examination of Voltaggio by defendant's counsel (STM: 465, referring to 172-173, 176).

The court then delivered a lengthy, balanced summation of the evidence. Twice, the court inadvertently indicated that Schumann as well as Voltaggio had identified Robinson (STM: 18, 30-31). However, on each occasion, fol-

lowing conferences at the bench, the court immediately indicated the error to the jury and corrected it (STM: 18, 31).

On the afternoon of February 18, 1974, the trial was concluded with a verdict of guilty on all counts.

Prior Proceedings

A. State

Petitioner's identification claim was exhausted on unsuccessful direct appeals from his conviction. The conviction was affirmed by the Appellate Division, First Department, *People* v. *Robinson,* 36 A D 2d 690 (Table); leave to appeal to the New York Court of Appeals was denied on April 7, 1971.

B. Federal

On May 5, 1971, in an application for writ of habeas corpus filed in the United States District Court for the Southern District of New York (COOPER, J.), petitioner again raised his identification claim. The application was denied without a hearing by order dated December 15, 1971. However, subsequently, having found that the failure to provide petitioner with counsel at his police station showup identification violated the *Wade* case [*U.S.* v. *Wade,* 388 U.S. 218 (1968)], this court reversed the lower court and remanded the matter for an evidentiary hearing on the following question:

> "whether Officer Voltaggio's identification had an independent source, that is, was based upon '. . . observations of the suspect other than the [showup] identification'" (468 F. 2d 163, citing *Wade* at 240).

This court also noted, significantly:

> "Suffice it to say that there is evidence in the record which would justify a finding either way on the issue of 'independent source' ". (468 F. 2d at 164).

The hearing was held in the District Court on May 29-30, and June 11, 19-21, 1973. It included detailed testimony by Voltaggio, Horan, and Robinson, as well as the submission of a number of exhibits, relating to the events of the crime and the flight from the scene of the crime, Robinson's arrest, and his subsequent, allegedly tainted identification.

Patrolman Voltaggio described in detail the sequence of events from the time he noticed Robinson standing over Greenberg's body to the capture of the Pyles brothers (HTR: 6-8, 12, 17-20, 139, 165-168, 557-573). He repeated what he was able to remember of the warrant hearing (HTR: 29-30, 155-156, 589), the stationhouse showup (HTR: 33, 108), and the photographic array (HTR: 37, 120), but denied being present at the arraignment (HTR: 124). The substance of his testimony has already been summarized, *supra,* pp. 2-6, and will therefore not be repeated.

With respect to the stationhouse identification, he conceded that in a meeting with Assistant Attorney General Stanley Kantor on October 18, 1972, he had originally stated that there was a lineup rather than a showup (HTR: 113-116); however, he asserted that his present recollection was accurate and that his earlier remarks to Kantor had been prompted by his confusion of this case with another one in which a lineup had been held (HTR: 118).

During the course of his testimony, Voltaggio also exhibited confusion about the purpose of the hearing. On cross-examination, on the first day of his testimony, he asserted that he was unaware of the purpose of the proceeding (HTR: 53); however, subsequently, on being recalled to the witness stand by his counsel after an interval of approximately three weeks, he recalled that he had been told that the proceeding involved an application for federal habeas corpus relief (HTR: 533).

Matthew Horan described the placing of an alarm for Robinson's arrest (HTR: 192-193, 311, 313), the details

of Robinson's arrest (HTR: 226-228), the stationhouse showup (HTR: 230, 345), the arraignment (HTR: 355), and the photographic display (HTR: 256). The substance of his testimony is summarized, *supra,* pp. 4-6.

Carl M. Robinson repeated the alibi defense he had set forth at his state court trial, although he now claimed he had reached the fishing spot at "10:00, maybe 10:30 (A.M.)" [HTR: 480] rather than after 11:00 A.M. (STM: 381). He described his arrest (HTR: 397-398), the stationhouse showup (HTR: 412-415, 420-422, 425, 430-431, 501-502), and the arraignment (HTR: 439).

C. The Decision Below

On January 31, 1974, in a detailed, thoroughly reasoned memorandum decision, the District Court unequivocally concluded that petitioner's habeas corpus application "is devoid of merit and must be denied" (Opinion, p. 2).

The decision was premised first and foremost on a careful review of Voltaggio's opportunity to observe Robinson during the commission of the crime—a review which led the court to conclude that "the Government produced clear and convincing evidence of a source for the in-court identification arising independently of the illegal confrontation" (371 F. Supp. at 418). Moreover, having meticulously examined each of the so-called taints, the court unequivocally found that they were not so *per se* objectionable as to constitute a denial of due process (371 F. Supp. at 419-421). Judge Cooper then reaffirmed that "Voltaggio's identification was unwavering and based upon adequate visual observation at the scene of the crime" (Opinion, p. 33).

The reasoning behind the District Court decision will be referred to at greater length in the course of Point I of our brief (*infra,* p. 12, ff.).

POINT I

The evidentiary record clearly supports the finding of the District Court that there was an independent basis for Voltaggio's in-court identification and that it was therefore admissible.

A. The Issue Presented Herein

Despite the inordinate bulk of the evidentiary record in this case, the proceedings before the District Court can be telescoped in terms of one basic issue—an issue that had been carefully framed by this court in ordering the remand:

> "The principal question . . . is whether Officer Voltaggio's identification had an independent source." (468 F. 2d at 163)

Since the lower court has answered this question in the affirmative, following an extensive evidentiary hearing, the sole question in this appeal—a point glibly minimized by petitioner—is whether Judge Cooper's findings are "clearly erroneous". 28 U.S.C. Federal Rules of Civil Procedure, Rule 52(a); *U.S. ex rel. Miller* v. *LaVallee*, 436 F. 2d 875, 876 (2d Cir. 1970); *U.S. ex rel. Phipps* v. *Follette*, 428 F. 2d 912 (2d Cir. 1970). Indeed findings of witness credibility —which is essentially what Judge Cooper's findings are— cannot be overturned even if it is "doubtful . . . whether any other judge would under all of the circumstances . . . [have] reached the same result", *U.S. ex rel. Fitzgerald* v. *LaVallee*, 461 F. 2d 601 (2d Cir. 1972), *cert. den. sub. nom LaVallee* v. *Fitzgerald*, 409 U.S. 885 (1973); *U.S.* v. *Sheard*, 473 F. 2d 139, 154 (Ca. D.C. 1973), *cert. den.*, 412 U.S. 943 (1973).

Here, petitioner is, in effect, asking this court to substitute his own self-serving version of the credibility of witness testimony over the thorough and sound determination of the District Court (See Parts B and C, *infra*). Almost grasping at straws, petitioner additionally asserts that the

lower court's findings are predicated on an improper evidentiary standard (Part D, *infra*). However, his claims are plainly without merit.

B. The Independent Basis for Voltaggio's Identification

As this court has already emphasized in its previous opinion, in a situation such as the present one, involving a post arrest confrontation between an eyewitness and the accused without the presence of counsel, there must be "clear and convincing evidence" of an alternative source for the eyewitness identification. 468 F. 2d 164, citing *U.S.* v. *Wade,* 388 U.S. 240 (1967). The record below makes it clear that such evidence *does* exist.

Following well-established doctrine, the District Court focused essentially on "the opportunity of the witness to view the criminal at the time of the crime", *Neil* v. *Biggers,* 409 U.S. 188, 199 (1972); See also, *U.S. ex rel. Phipps* v. *Follette,* 428 F. 2d 912 (2d Cir. 1970), noting at 915 that "much will depend on the witness' initial opportunity for observation and also on whether he was motivated to make a careful observation of the perpetrator"*; also *Clemans* v. *U.S.,* 408 F. 2d 1230, 1237, 1241 (D.C. Cir. 1968), en banc.

Although Judge Cooper found that Voltaggio had no more than seven to ten seconds** to observe the robbery from the time Robinson was standing over Greenberg's body till the time he entered the car and perhaps two to

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* Both the *Neil* and *Phipps* case refer to identifications which took place prior to the applicable date of the *Wade* case. However, the importance of a witness' initial opportunity to observe and his motivation are obviously important factors in a post-*Wade* situation as well. See, e.g. *U.S.* v. *Kahan,* 479 F. 2d 290, 294, fn. (2d Cir. 1973).

** This figure represents a finding that was made after weighing Voltaggio's claim that he had 14 seconds to view Robinson against a test set forth by this court, in its previous consideration of this case, under which it was estimated Voltaggio may have had only four seconds to view Robinson. See 371 F. Supp. at 412, referring to 468 F. 2d at 164.

three more seconds to observe Robinson when he fled from the car, "in the context of this case it was sufficient" (371 F. Supp. at 412, 417). The reasoning behind this conclusion was summarized by the court as follows:

> "The visibility conditions were excellent and during that period petitioner came within 25 feet of Voltaggio. Moreover, Voltaggio was able to observe petitioner again as he jumped from the Cougar and fled up Sixth Avenue. On this occasion, Voltaggio was only 30 to 40 feet from petitioner as he emerged from the Cougar (Tr. 20; 573), a distance sufficiently short to enable Voltaggio to scrutinize once again the assailant's features and confirm in his mind the mental image developed seconds before at their confrontation at 46th Street and 8th Avenue. Though of itself this later opportunity for observation—it could have taken no more than '2 or 3 seconds' (STM: 196)—would hardly have been an adequate independent source, it afforded Voltaggio an opportunity to confirm or bolster his image of the assailant developed seconds before at 46th Street and 8th Avenue." (371 F. Supp. at 417)

Judge Cooper also noted that Voltaggio was clearly motivated to make an accurate observation:

> "Moreover, Voltaggio was a trained police officer who upon observing the commission of a crime immediately concentrated his efforts upon apprehending the assailant and his accomplices. This must undoubtedly have included focusing upon the assailant's features for the purpose of making a subsequent identification. We therefore give greater weight to Voltaggio's testimony than we would were he an ordinary bystander or a victim of the crime." (371 F. Supp. at 418)

The court went on to conclude that

"The Government produced clear and convincing evi-

dence of a source for the in-court identification arising independently of the illegal confrontation." (371 F. Supp. at 418).

This finding is certainly well within the factual perimeters of prior identification cases of this circuit. See *U.S.* v. *Yanishefsky,* —— F. 2d (2d Cir. July 30, 1974), sl. sh. op. no. 1145 (Momentary viewing of side of appellant's face); *U.S. ex rel. Birt* v. *Schubin,* 498 F. 2d 1396 (2d Cir. 1974) (Table) (Brief viewing of fleeing robber by 14 year old narcotics addict); *U.S. ex rel. Armstrong* v. *Casscles,* 489 F. 2d 20, 23-24 (2d Cir. 1973) (1 minute observation); *U.S. ex rel. Cummings* v. *Zelker,* 455 F. 2d 714 (2d Cir. 1972) (15 second observation).

Petitioner asserts that there are several errors and omissions in the District Court's conclusion.

Firstly, he contends that the decision ignored certain "discrepancies" in Voltaggio's various descriptions of Robinson (Applt's Br. pp. 32-35). However, these descriptions—including the one furnished by eyewitness Schumann (STM: 58)—are far more noteworthy for their similarities than for their differences. Robinson was described as approximately 5′7″, 135-150 pounds, wearing an Afro style haircut, mustache, and dark jacket and shirt. The fact that the descriptions were not mathematically precise in naming petitioner's *exact* weight or height, or the precise thickness of his mustache, or the shading of the color of his pants is hardly material. Petitioner appears to demand a degree of precision that would be more appropriate for a computer than a witness with normal powers of observation. *Cf. Yanishevsky* and *Armstrong,* cases, *supra,* p. 15.

This view is plainly reflected in the conclusion of the District Court, which, after careful observation of the discrepancies, stated that:

"There are indeed discrepancies in the various descriptions of petitioner given by Voltaggio . . . such dis-

> crepancies, however, fail to give rise to any substantial doubt as to whether the image that Voltaggio retained from his observations at the scene of the crime was significantly and positively accurate to form an independent basis for his subsequent identification." (371 F. Supp. at 422).

Although conceding that Voltaggio "did not impress [the court] as a keen individual", the court noted that the discrepancies were hardly significant in view of the 21 months between the incident and trial and the "more than 5 years" between the incident and the hearing:

> "This argument, however, ignores several critical factors. First, as we stated above, the Hearing was held more than five years after the incident in question. Even the brightest recollection in the keenest of minds would have dimmed substantially during the interval and petitioner cannot be allowed to gain advantage from the lapse of time between the crime with which he was charged and the hearing years later of his application for relief . . . What was requisite in this instance was what the eye beheld, not what could be dredged from one's mental faculties. Recognition of a person or face is above all the product of a mental image which becomes fixed at the moment of confrontation. That the details of the time period of confrontation may fade with the passing of time is therefore not proof that the image when fixed was not accurate or reliable." (371 F. Supp. at 417-418).

Also significant in this respect is the fact that in comparing the conflicting testimony of Voltaggio and Robinson, the District Court noted that it was Voltaggio, not Robinson, whose candor "scored high":

> "Though there are inconsistencies in Voltaggio's testimony regarding other details of the pre-trial procedure, they are typical of human frailties consistent

> with an honest witness whose candor and effort at recollection were clear and undeniable. From our vantage point, this witness scored high. (371 F. Supp. 413-414).
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> Petitioner's testimonial expression was in marked contrast to that of Voltaggio; a certain shrewdness and cunning substituted for candor. His demeanor as a witness was suggestive of meticulous preparation and rehearsal prior to trial and his testimony smacked too much of a prepared and expected call of triumph, 'Now I got you!' In the main, it is clear that petitioner took great liberties with the truth; he was not convincing and we find ourselves duty bound to reject his testimony." (371 F. Supp. at 414).

Since these credibility findings are not "clearly erroneous", they are not open to challenge in this court. See F.R.C.P. Rule 52(a), and case citations at pp. 12-13, *supra.*

Petitioner also claims that, as a police officer, Voltaggio was under extreme psychological pressure to bolster the credibility of his initial opportunity to observe petitioner (Applt's. Br. 35-37). However, this argument is obviously of no probative force; it merely constitutes an unsubstantiated opinion which could be indiscriminately raised for *any* identification. It is far more likely, as already noted (*supra,* p. 15), that as a police officer, Voltaggio was trained to make and respected the need for an accurate, unbiased observation of a criminal suspect. Indeed, as further noted above, it was Voltaggio's credibility, rather than Robinson's which "scored high" with the trier of fact. (371 F. Supp. at 413-414).

C. The Alleged Taints In The Post-Crime Identification Procedures

Petitioner asserts that there were four separate "irreparable" taints to Voltaggio's in-court identification during

the procedures which followed the commission of the crime. However, in each instance the District Court's reasoning is dispositive under the "clearly erroneous" rule of F.R.C.P. Rule 52(a). (See pp. 12-13, *supra*).

The first taint involved the fact that at the warrant hearing held on the night of the crime Voltaggio, prior to his testimony, heard Robinson characterized as the perpetrator by Detective Horan (W.H.M., p. 4, ff.), and then heard him fully described by his girl friend (W.H.M. 11-12). Which acknowledging that "there were improper elements of suggestion" in this procedure (371 F. Supp. at 419), the District Court aptly concluded that this was not critical:

> "No identification was made at the warrant hearing . . . Moreover, the show-up was conducted only 36 hours after the crime. Accordingly, in light of Voltaggio's opportunity to scrutinize the assailant at the scene of the crime on the preceding day, we are not persuaded that the identification at the show-up or the subsequent trial was based upon his having heard the testimony of Chambers or Horan." (371 F. Supp. at 420).

The second alleged taint involved the one man showup in the stationhouse on the day after the commission of the crime.* Again, in spite of the fact that the procedure was "highly suggestive" (371 F. Supp. at 420), the court found

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* In the earlier proceedings on this case in this court, this office noted that the failure to provide petitioner with counsel at his showup was not a taint because it occurred before the "initiation of judical criminal proceedings". See *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972). The majority opinion of this court, however, held that the filing of the arrest warrant constituted the start of criminal proceedings (468 F. 2d at 163; cf. dissent of Judge Hays at 468 F. 2d 165-166). At this time, we renew the argument presented earlier that the filing of an arrest warrant does not constitute the start of judicial criminal proceedings within the meaning of *Kirby*.

from the evidence that there was not "a substantial likelihood of irreparable misidentification" (371 F. Supp. at 420):

> "Voltaggio's exposure to petitioner at the stationhouse lasted less than a minute; he identified petitioner immediately upon looking at his face. We find no reason to suspect that the mental image formed by Voltaggio then was in any way different from that formed at the scene of the crime or in any way distorted or supplanted it. We see therefore no reason to conclude other than that Voltaggio was able to identify petitioner through his encounter at the crime rather than at the police station."

The finding clearly finds support in case law of this circuit. See *U.S. ex rel. Lucas* v. *Regan,* —— F. 2d —— (2d Cir. Sept. 3, 1974), slip. sh. op. no. 1070; *U.S.* v. *Kahan,* 479 F. 2d 290, 294 (2d Cir. 1973); *U.S. ex rel. Frasier* v. *Henderson,* 464 F. 2d 260 (2d Cir. 1972), all upholding eyewitness identifications because of the presence of a source independent of a one man or otherwise wrongful showup. Indeed, as noted by Judge Cooper, since the showup occurred only 36 hours after the crime, it certainly could not have refreshed Voltaggio's already vivid recall of Robinson (371 F. Supp. at 420).

The third and fourth alleged taints involve the showing of Robinson's photograph to Voltaggio during the arraignment. Here, the court once again quite properly reasoned that the shortness of the time lapse from the robbery (two days) made it "highly unlikely that the photograph might have supplanted or distorted Voltaggio's original image of the assailant" (371 F. Supp. at 421). Judge Cooper went on to note:

> "There is no suggestion in the record that the showing of the photograph was motivated by any uncertainty on the part of Voltaggio or that he studied it for the

purpose of improving his recollection. Inasmuch as no reasonable basis is apparent, we are unwilling to attribute such a motive to Horan or Voltaggio. In all probability Horan showed Voltaggio the photograph as a fellow officer in order to make him privy to the ongoing investigation, thinking that the identification procedure had already been completed. While, as we have already stated, Voltaggio should not have been made a participant in the investigation, his forced participation, whether with respect to Horan's conclusions as to petitioner's guilt or the use of the photograph, is not grounds for rendering his identification inadmissible." (371 F. Supp. at 421).

The District Court's finding is, again, well within the bounds of prior decision law. See, e.g., *Simmons* v. *United States,* 390 U.S. 377 (1968), noting at 384 that "a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"; also *U.S.* v. *Evans,* 484 F. 2d 1178, 1186 (2d Cir., 1973).

D. The Alieged Failure Of The District Court To Apply A Proper Standard of Proof

Apart from his various claims, *supra,* Parts B and C, petitioner also asserts that the District Court did not utilize the clear and convincing evidence standard of the *Wade* case (*Wade,* 388 U.S. at 240) in measuring the separate and cumulative effect of the taints on the evidence of the independent source viewing (Applt's Br. 39-43). Instead, petitioner argues, the District Court viewed the taints only in terms of themselves—that is, by the pre-*Wade* standard of whether they were "so unnecessarily suggestive and conducive to irreparable mistaken identification that he (Robinson) was denied due process of law" (See *Stovall* v. *Deno,* 388 U.S. 239 (1967), at 301-302).

However, apart from its lack of inherent merit,* the argument reflects a gross misconstruction of the lower court's legal analysis; indeed it is flatly confuted by portions of the decision.

At the outset of his legal analysis, Judge Cooper unequivocally asserted that the issue of the force of the post-arrest taints would necessarily be considered in the very terms which petitioner now asserts were not applied:

> "[1, 2] The issue before us is whether the pre-trial identification process set forth above should have precluded Voltaggio's in-court identification of petitioner. Whereas here the illegality of the pre-trial identification procedure is already established because petitioner was deprived of his right to counsel, *the State bears the burden of establishing by clear and convincing evidence that the in-court identification was based upon observations of the suspect other than during pre-trial identification procedures; that the in-court identification had an independent origin and was not tainted by the prior illegal procedures. United States* v. *Wade,* 388 U.S. 218, 240-241, 87 S. Ct. 1926, 18 L.Ed. 2d 1149 (1967)." (371 F. Supp. at 415-416, emphasis added)*

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* What petitioner's argument ultimately boils down to is the degree of difference between the "clear and convincing" *Wade* standard (388 U.S. at 240) and the "totality of the circumstances" pre-*Wade* standard (*Stovall,* 388 U.S. at 302). We respectfully submit that such difference as does exist is of little *practical* significance. Regardless of which standard is applied, the court must still carefully assess the impact of the alleged taint in terms of whether there was an independent basis for the witness' in-court identification. Cf. *U.S. ex rel. Armstrong* v. *Casscles,* 489 F. 2d 20 (2d Cir. 1973) (pre-*Wade* identification) and *U.S.* v. *Yanishefsky,* —— F. 2d —— (2d Cir. 1974) sl. sh. op. no. 1145 (post-*Wade* identification).

* Petitioner also asserts briefly (Applt's Br. 43-49) that the District Court tested the evidence herein only by the "fair preponderance of the evidence" standard. However, the quote, *supra,*

(footnote continued on following page)

In his subsequent evaluation of the evidence, Judge Cooper again and again returned to the standard which we have just cited. Thus, in summarizing the evidence on the at-the-scene viewing (the independent basis evidence), Judge Cooper noted:

> "We conclude, therefore, that the Government produced *clear and convincing* evidence of a source for the in-court identification." (371 F. Supp. at 418, emphasis added)

Subsequently, having reviewed the evidence on the post-arrest taints, the court once again asserted:

> "In the instant case the record is *clear* that Voltaggio's identification was *unwavering* and based upon adequate visual observation at the scene of the crime". (371 F. Supp. at 409, emphasis added; 'unwavering' is plainly synonymous with 'convincing')

Finally, having taken stock of case law that was allegedly favorable to petitioner [e.g. *Kimbrough* v. *Cox,* 444 F. 2d 8 (4th Cir. 1971)], the court affirmed:

> "That description (*e.g.* of Voltaggio) was accurate and sufficiently detailed to demonstrate that Voltaggio's in-court identification was based upon his observation at the scene of the crime and was not derived from the confrontation at the showup." (371 F. Supp. at 423)

Although it is true, as petitioner has taken elaborate care to note, that the "irreparable misidentification" *Stovall* standard is cited several times in the discussion of the

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(footnote continued from preceding page)

and the ones which follow underline the absurdity of this argument; in fact, the "fair preponderance" test is only alluded to once by Judge Cooper (371 F. Supp. at 415) and then merely as a measure for determining the credibility of conflicting portions of the testimony of Voltaggio and Robinson regarding the pertinent identification procedures.

alleged taints (*viz.*, 371 F. Supp. at 419-421), Judge Cooper was merely addressing himself to a point raised but not reached in this court's earlier consideration of this case—the question of whether the improper procedures, and, in particular, the showup created a *per se* violation of due process, irrespective of the independent basis for the identification (468 F.2d at 163).* Judge Cooper, for good cause, found that they did not. His reasoning on this point is merely a corollary of his broader conclusion that, on the sum total of the evidence, there is a clear and convincing independent basis for Voltaggio's identification (See parts B & C *infra*).

Since the decision is a sound and exhaustive treatment of the issues raised herein it should in all respects be affirmed. See F.R.C.P. Rule 52(a) and case citations, *supra*, p. 13.

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* The case of *Neil* v. *Biggers*, 409 U.S. 188 (1972)—which was decided *after* this court's earlier opinion herein—pointedly suggests that the *per se* use of an improper identification procedure can not in and of itself vitiate an in-court identification. In *Biggers*, the court found that a one-man, police showup without presence of counsel, with two detectives walking respondent past the victim, did not vitiate the victim's subsequent in-court identification. The majority opinion (POWELL, J.) noted pertinently:

> "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. *But as Stovall makes clear, the admission of evidence of a showup without more does not violate due process.*
>
> What is less clear from our cases is whether, as intimated by the District Court, unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to petitioner, we do not think that the evidence must therefore be excluded. *The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, not because in every instance the admission of evidence of such a confrontation offends due process.*" (409 U.S. at 199, emphasis added).

POINT II

In any event, the accumulated circumstantial evidence tends to establish that there was no misidentification.

Apart from the issues discussed in Point I, *supra,* petitioner conveniently minimizes or directly overlooks a wealth of circumstantial evidence which irrevocably links him to the commission of the crime (Applt's Br. 37-38).

While it is true that the only evidence at the state trial that petitioner committed the crime, other than Voltaggio's identification and the bolstering testimony of Barcello and Schumann, was the Hertz rental argreement for the getaway car with his name on it—a fact, which, as this court has already indicated is not of direct probative force (468 F. 2d at 165)—the force of this latter piece of evidence is substantially enhanced by petitioner's repeated failure at the state court trial *and* at the federal evidentiary hearing to produce *any* of the so-called key witnesses who could have substantiated his alibi. This "accumulated circumstantial evidence," obviously "tend[s] to establish that there was not substantial likelihood of irreparable misidentification" *U.S. ex rel. Gonzalez* v. *Zelker,* 477 F. 2d 797, 803-804 (2d Cir. 1973).

Petitioner asserted at his trial that the car was rented by him the night before the crime for one J. B. Ray, a childhood chum, because petitioner thought that Ray, as a nonresident of Port Chester, could not make the rental (STM: 329-333; 346-347; 351-352, 308). However, petitioner conveniently noted that he did not know Ray's address or his whereabouts; indeed, he had not even looked for Ray (STM: 350-351). At the federal hearing, the situation was apparently no different; Ray was still not produced as a witness.

Apart from Ray, two other witnesses who might have bolstered the credibility of petitioner's story were the Pyles

brothers. However, they also did not testify at the state court trial. Petitioner asserts that his was because of judicially sponsored intimidation. However, as we will indicate, *infra,* Point III, a far more parsimonious explanation is that the brothers, heeding the advice of their counsel, decided not to testify because any testimony that would have helped Robinson would have laid them open to a perjury indictment. In any event, it is of obvious significance that despite their alleged importance, the Pyles brothers also did not testify at the federal evidentiary hearing, even though this took place six years after the events of the crime, when the threat of self-incrimination no longer existed.

Odessa Chambers, petitioner's then girl friend (and now wife) also did not testify at the trial or the hearing, although she clearly could have bolstered the part of petitioner's alibi indicating that on the day of the crime he left his house around 10:30 or 11:00 A.M.* Cf. *U.S. ex rel. Ramsey* v. *Vincent* (S.D.N.Y. May 10, 1974), unreported memorandum decision by FRANKEL, J. where claimant's wife also was an important witness for his alibi story and, although failing to testify at his trial, *did* testify at his federal evidentiary hearing.

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* Since the crime was committed at approximately 11:30 A.M. in Manhattan the time at which Robinson left his house in Port Chester is of obvious relevance. Astonishingly Robinson's recollection of this pivotal detail appears to be unclear: at the trial he asserted that he left at 11:00 A.M. (STM: 381); at the hearing, "10:00 (A.M.), maybe 10:30 (A.M.)" (HTR: 480).

POINT III

The various alleged errors committed by the trial court, petitioner's trial counsel, and the District Attorney were not raised in the District Court and thus cannot be raised here; in any event, the errors are not significant enough to warrant the granting of habeas corpus relief.

Apart from the question of the admissibility of Voltaggio's identification, petitioner also sets forth briefly, a group of so-called prejudicial errors committed by the court, the District Attorney, and petitioner's counsel during his trial.

However, the short answer to these claims is that since they were never raised before, during or after the District Court hearing, they cannot now be raised here. *United States ex rel. Springle* v. *Follette*, 433 F. 2d 1380 (2d Cir. 1970), *cert. den.* 401 U.S. 980 (1971); *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13 (2d Cir. 1969), *cert. den.* 395 U.S. 935 (1968).*

In any event, any reasonable examination of the errors clearly indicates that they do not rise to the level where they are cognizable by this court—that is, to the level where they deprived petitioner of his constitutionally protected right to a fair trial. See *Lisenba* v. *California*, 314 U.S. 219, 236 (1941); *United States* v. *Valdes*, 417 F. 2d 335, 336 (2d Cir. 1969), *cert. den.* 399 U.S. 912 (1969); *United States ex rel. Mintzer* v. *Dros*, 403 F. 2d 43 (2d Cir. 1967), *cert. den.* 393 U.S. 1088 (1968).

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* Petitioner might argue that although the claims were not raised below, they *were* raised in the initial phase of this proceeding, prior to the remand by this court. However, this is hardly relevant in view of the fact that petitioner was represented by the *same* counsel in his prior appearance before this court *and* in the District Court. Thus, the failure to raise the claims either before, during, or after the evidentiary hearing clearly constitutes a knowing and deliberate waiver.

The foremost error asserted by petitioner is that the District Attorney and the trial judge deliberately intimidated the Pyles brothers—the two witnesses whose testimony would allegedly have bolstered his alibi defense (Applt's Br. 19-21; 54). However, this is quite simply a distortion of reality.

As we have already indicated, *supra,* pp. 7-8, when the Pyles initially appeared in Judge Frank's chamber, they still faced the possibility of an indictment for "impairing prosecution" (STM: 304-305). In view of this, the court warned them that they had a constitutional right not to testify and should consult a lawyer before doing so (STM: 292-294, 303). This entirely proper warning—which the court explicitly indicated did not cause any hidden message that the Pyles would actually be indicted if they testified (STM: 321)—is the sole basis for petitioner's claim.

Significantly, after the Pyles asserted that they did wish to testify, the court, at the behest of the District Attorney, advised the Pyles that their testimony would not be used affirmatively against them (STM: 417, referring to District Attorney's comments at 364, 366). The Pyles then *again* asserted that they would testify (STM: 418-419, 422).

Subsequently, when the Pyles failed to appear at the time they were supposed to testify, their lawyer advised the court:

> "Judge, what I said to Pyles brothers Walter and Charles Pyles, that if testimony that they gave was false they may be prosecuted for perjury.
> I also told them that they had 2 obligations—one moral obligation and one legal obligation.
> I said: legal obligation was primarily to themselves and it is their moral obligation if the facts that they related to me about which they were going to testify were true, they had a moral obligation to Mr. Carl

> Robinson to come into this Court and tell this Court precisely the facts and circumstances surrounding the incident that they were a party to or had knowledge of. I said further: that if the information they gave would implicate them then I would say that if it did implicate them, that they should not testify." (STM: 433).

Thus, there is an obvious inference to be drawn from the Pyles' non-appearance: they had decided not to testify because, based on their lawyer's comments, they realized that a true version of the events of the day of the crime would merely implicate their friend, whereas a perjurious version would expose them to the possibility of a further indictment.

The second error asserted by petitioner is the inclusion of a reference in Voltaggio's recent testimony to the allegedly improper stationhouse showup (Applt's Br. 51-52, referring to STM: 149). However, placed in its proper context, it becomes clear that the reference was an all together negligible aspect of Voltaggio's testimony; in the first place, the showup is never actually referred to; secondly, the thrust of his objected to remarks was to underline the extent of his observation powers *at the time of the crime:* when the crime was committed Robinson had a mustache; subsequently, the mustache was shaved off. Thus, the allegedly improper reference is clearly "harmless error". See *Harrington* v. *California,* 395 U.S. 250, 254 (1969); *Chapman* v. *California,* 386 U.S. 987 (1967).

Petitioner also asserts that his trial counsel was "inadequately prepared on the facts" relating to the identification (Applt's Br. p. 57). However, in view of the extent and detail with which Robinson's trial counsel probed this area on cross-examination of Voltaggio and on cross-examination of all the People's eyewitnesses and, again, in his summation, it is clear that this claim is specious.

See, analogously, *United States ex rel. Marcelin* v. *Mancusi*, 462 F. 2d 36, 42-43 (2d Cir. 1972), *cert. den.* 410 U.S. 917 (1973); also, *Yanishevsky* case, cited *supra*, p. 16.

Finally, petitioner argues that the court committed reversible error by incorrectly stating in its summation that another eyewitness besides Voltaggio had identified petitioner as the assailant (Applt's Br. p. 54). However, what petitioner neglects to mention is that on each occasion his allegedly incompetent trial counsel immediately called the error to the court's attention, and that Judge Frank forthwith corrected it.

Thus, the sum total of the alleged errors by the court, the District Attorney, and the prosecutor, clearly did not involve a constitutional denial of due process. See case citations, *supra*, p. 27.

CONCLUSION

The judgment of the District Court should in all respects be affirmed.

Dated: New York, New York, October 2, 1974.

Respectfully submitted,

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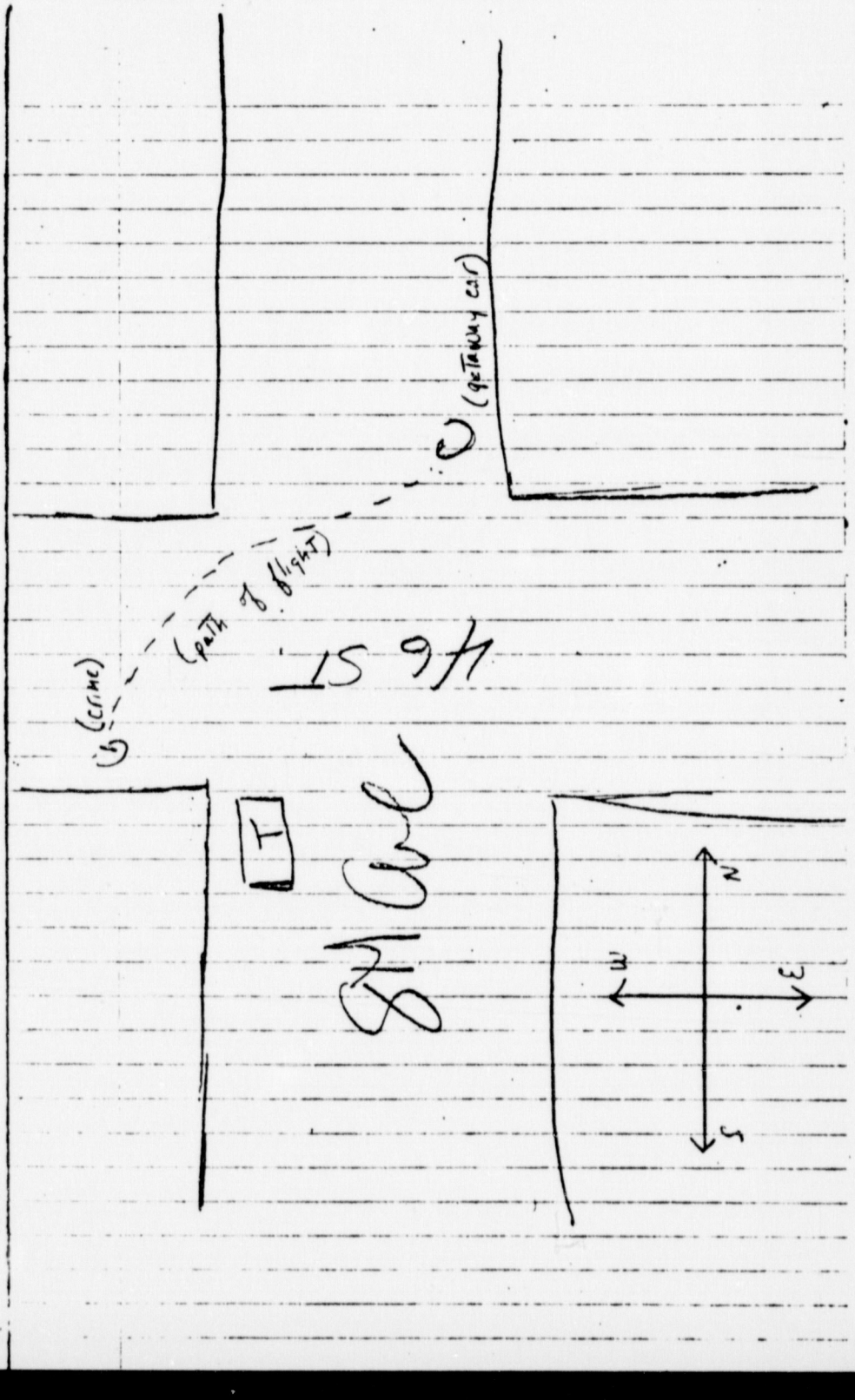
ADDENDUM- Copy of Respondent's Exhibit "A".



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